Supreme Court U.S.
FILED
JAN 19 1900
JAMES H. McKENNEY,
Clerk

No. 108.

Ropley Bf. of Turner, Burry

Supreme Court of the United States

District for C. C.

OCTOBER TERM, A. D. 1899.

Filed Jan 08. 19, 1900.

THE FARMERS' LOAN AND TRUST COMPANY,
PLAINTIFF IN ERROR,

vs.

THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK, AND THE NORTHERN TRUST COMPANY,
DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF ILLINOIS.

REPLY FOR PLAINTIFF IN ERROR.

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Solicitors for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-12-1900

IN THE

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I.

ERRORS OF FACT IN STATEMENTS OF COUNSEL.

In the briefs filed for the defendant in error The Lake Street Company there are many statements of alleged facts as to the supposed equities of defendants in error, which, besides being wholly aside from the questions before the court, are wholly unsupported by the record.

While in our view these statements are immaterial to the questions involved on this writ of error, they are calculated to give an erroneous and prejudicial impression as to the relative positions of the parties on the merits of the controversy, and for that reason we will notice them briefly here.

(1.) Counsel says (Brief, p. 4) that the 610 bonds not joining in the scaling arrangement and which joined in the demand for foreclosure were all "owned by" William Ziegler, and makes certain statements as to Mr. Ziegler's relation to and alleged action in connection with the Lake Street Company, as alleged in the bill which was filed by that company, after he had refused to join in the scaling arrangement.

While the merits of the claims made in the bill of the Lake Street Company against Mr. Ziegler are in no way material in the present suit, as a matter of fact the statement of counsel as to his ownership of the 610 bonds is not only unsupported by, but directly contrary to the record.

It appears from the record that 210 of the 610 bonds are owned by 13 different owners in different amounts, and the answer to the bill of the Lake Street Company of each of these owners, supported by his affidavit that he is a *bona fide* holder, without notice of any of the alleged equities, is in the record. (See Pr. Rec., pp. 486–530).

(2.) It is stated that a bill was filed by Mr. Ziegler against the Lake Street Company, and different statements are made as to this bill and the decree rendered under it (Brief, pp. 4, 5). These statements are not only erroneous in fact, but are absolutely without any foundation in the record, for the reason that neither the bill referred to nor any of the proceedings under it are in evidence. Nor is there any evidence whatever as to them in the record.

In addition to this, the fact (not stated by counsel) that 210 of the 610 bonds which joined in the demands to fore-

close were not owned by Mr. Ziegler, but by others, makes these wholly unsupported statements the more misleading.

(3.) It is said that "immediately after" the proceedings in the suit referred to were had before Judge Showalter a demand was made by Mr. Ziegler on the trustees to foreclose, etc. In fact, the record shows repeated demands on the trustees to take action by the thirteen other different owners of the 210 bonds, on account of the admitted defaults in interest (Pr. Rec., pp. 380–'6, 394, 400), having no possible relation to the suit referred to.

(4.) Different erroneous statements are made as to the action of plaintiff in error and the bondholders who did not join in the scaling arrangement and the supposed merits of the present suit.

The actual facts as to the matters referred to and the real merits of the suit, as shown in the record, are stated on pages 12–19 of our original brief, and also pages 21–33 of our brief on the motion to dismiss, to which we refer the court again in this connection.

II.

THE CONTENTIONS OF DEFENDANTS IN ERROR AS TO THE REMOVAL BOND.

The discussion by counsel for the Lake Street Company of the points they make as to the removal bond (see Point V, pp. 30, 31, of their brief), contains nothing which is not fully met by what we said in discussing the bond at pages 47–59 of our former brief, and by what we shall say in this reply as to the points made by counsel for the American bank as to the bond.

As to the points on the bond made by counsel for the American bank:

1. The first contention of counsel is that the bond was "not made by the petitioner for removal" (Br., pp. 8–10).

No reason whatever, except the purely technical one that the literal language of the Removal act, viz., "shall *make* and file" a bond, requires it, is stated in support of this position, and no attempt is made to answer the conclusive reasons which we gave in our former brief, at pages 47–59, why the act should not be construed as requiring the bond to be *signed* by the removing party.

Counsel attempt to distinguish the cases of *Stevens vs. Richardson*, 20 Blatch., 53, and *Public Grain & Stock Exchange vs. Telegraph Company*, 11 Biss., 568, cited and quoted at pages 50, 51 of our former brief, on the ground that they were, both of them, decisions "rendered on motions to remand, where the condition of the *defective* bond had already been performed, and where no objection had been made thereto in the State court."

In neither of those cases did the court hold that the bond was "defective" because not signed by the removing party, but that it would be held good, after the case had been removed, on the ground suggested by counsel (Br., p. 8), that "*after* a case has been removed, and after the condition of the bond has been performed to the extent of the filing of the record in the circuit court, there may be *a discretion* in that court *to allow an amendment* of the bond, or to hold that a *defect* in the bond *has been waived*."

On the contrary, in each of those cases the question involved, discussed, and decided was *whether the provision of the removal act, that the petitioner "make and file" the bond, required that he should personally sign it as one of the obligors;* and the court in both the cases held that the act *did not so require*, but that if the removing party offers the bond to the State court, signed by other persons as obligors, he "*makes* and files" the bond within the true meaning and construc-

tion of the language of the act, and that therefore the bonds there under consideration were sufficient.

Again, this attempted distinction on these cases in effect concedes our further position (Brief, pp. 57–59), that even if the bond was defective in the particular claimed, the defect was not *jurisdictional*, and the United States court therefore acquired jurisdiction, since otherwise that court would have no power or jurisdiction over the case "to allow an amendment" or to hold that the "defect" in the bond "had been waived."

2. The second contention of counsel is that "the record does not show that the bond tendered to the superior court was good and sufficient" (Brief, pp. 10, 11).

The argument is that the record does not *affirmatively* show the solvency and sufficiency of the sureties.

There are several answers to this position:

First. The record does not show that any objection whatever was ever filed or made in the State trial court by *the Lake Street Company*, the *obligee on the bond*, and therefore the only party interested in its sufficiency, either to the form of the bond or to the sufficiency of the sureties, or that it (or in fact *any* of the defendants in error) ever obtained, or even asked for, any rule on either of the sureties to justify.

The record, however, shows (as stated at page 10 of counsel's brief) that written objection (Pr. Rec., p. 35) were on February 1, 1896, filed by *the American bank* to the removal.

As to these objections, we say:

(1.) Plaintiff in error was not required by the act to give bond to its codefendants, but only *to the complainant*, The Lake Street Company, and for that reason the American Company was not named as an obligee in the bond, and, therefore, was not entitled to make objections to its efficiency,

much less to make objections which the obligee, The Lake Street Company, might and (as we have seen) did in fact waive.

(2.) The record does not show that these objections were ever brought to the attention of the State trial court, either on the hearing of the petition or at any time.

Nor does the order (Pr. Rec., p. 36) of the State trial court denying the removal show, by recital or otherwise, that any objection to the bond was ever made by any of the defendants in error on the ground of *the insufficiency of the sureties.*

And if it is competent to refer to the opinion of the State trial judge delivered in denying the motion to remove, that opinion does not show that any objections were ever made to the sufficiency of the sureties (Pr. Rec., p. 537).

That objections to the sufficiency of the sureties on a removal bond cannot be urged on appeal, but are held waived unless the record affirmatively shows that such objections were made in the trial court, was expressly decided in *Empire Transportation Company vs. Richards*, 88 Ill., 404.

See also—

Removal cases, 100 U. S., 471, 472.
W. U. Tel. Co. vs. Horack, 9 Brad., 309.

The only objections to the bond by the American bank were (Pr. Rec., p. 35) "that said petitioner has not filed *a good and sufficient bond*, as provided in and by the Revised Statutes of the United States," and "that the said bond filed herein is *insufficient* in form and substance."

We submit that these objections, even if the record showed that they had been brought to the attention of the State trial court, were not such objections as the rule laid down in the authorities requires in order to raise the question of the sufficiency of the sureties. The specific objection should have been made that the sureties were not sufficient. The purpose of the rule, as the authorities

show, is that the objector shall point out the *particular* defect objected to, in order that the petitioner may remedy it, and that if this is not done the objection is waived.

Second. The petition for removal averred (Rec., p. 32) that "your petitioner offers herewith a good and sufficient bond in the penal sum of five hundred dollars," etc., and was verified by affidavit. This allegation in the verified petition was sufficient to put the burden on those attacking the sufficiency of the sureties, and no evidence was produced that they were insufficient.

See Probst *vs.* Cowen, 91 Fed. R., 929, which expressly so holds.

Third. But, *further*, the record shows *affirmatively* that the sureties were sufficient.

The removal bond was signed by William Burry and Rockwell King, and was for the penal sum of $500. The affidavit of Mr. King stated "that he is worth more than the sum of ten thousand dollars in unincumbered real estate *in the city of Chicago*, over and above all his debts and liabilities" (Pr. Rec., p. 34).

Counsel refer in this connection to the *Monaghan* case (140 Ill.). Even if that case is law, it is not in point. There the affidavit merely stated that the surety was worth "over two thousand dollars, over and above all his exemptions of every kind, and over and above all his liabilities." The Illinois supreme court there held that the affidavit was insufficient because, as stated by the court, "it does not state *that he has any property subject to execution in the district or State.*"

Darst vs. Bates, 51 Ill., 440, is also referred to (Br., p. 11). In that case *no affidavit whatever* was presented to the State court as to the sufficiency of the sureties.

The order denying the removal (Pr. Rec., p. 36) does not

show, by recital or otherwise, that the removal was denied on the ground of the insufficiency of the sureties.

And the opinion of the State trial judge shows that he considered that Mr. King "is sufficient, so far as his financial standing goes" (Pr. Rec., p. 537).

3. Counsel contend that the State trial court "had jurisdiction to pass upon the sufficiency of the bond" (Br., p. 7).

Conceding this to be true as to the sufficiency of the sureties, the decision of the trial court was, of course, reviewable on the appeal to the State supreme court, and is equally reviewable on the present writ of error.

III.

THE CONTENTION THAT BY REASON OF THE FACT THAT THE AMERICAN TRUST AND SAVINGS BANK AND THE NORTHERN TRUST COMPANY WERE MADE DEFENDANTS TO THE BILL THE CASE WAS NOT REMOVABLE.

Our position on this point was fully presented at pages 59–100 of our former brief, and we will only add briefly by way of reply to what we have there said.

In the brief for the American bank, counsel renew the contention made in their brief on motion to dismiss or affirm, that the presence of merely *proper* parties will defeat the jurisdiction of the United States court. (See also Br. for Lake St. Co., p. 23.)

This contention was fully discussed by us at pages 60-68 of our former brief.

Counsel now concede (Br. for American Bank, pp. 12, 13) that the true rule is that the presence of merely *proper*, as distinguished from *indispensable*, parties will not defeat the jurisdiction of the Federal court, even in an original suit, and this proposition is established by the authorities cited in our former brief (pp. 60–68).

But counsel's contention is that if such proper parties are joined as defendants, the suit must be *dismissed* as to them in order to preserve the jurisdiction of the Federal court.

And the argument seems to be that because this is so, as we expressly stated at pages 62–63 of our former brief (see especially top of page 63), *therefore* the case is not one which could be originally *brought* in the United States circuit court, and *therefore* was not removable under the provisions of the Removal act.

This argument is fully answered by what we said in our former brief in discussing the question, at pages 60–68 and especially at pages 62–64.

The cases cited at pages 23–26 of the brief for the Lake Street Company recognize the rule for which we contend, as we pointed out at page 65 of our former brief.

Again, as pointed out in our former brief, the rule requiring a dismissal as to *proper* parties before decree in original suits only applies to the class of *proper* parties known as *necessary* parties, and not to those known as *formal* parties, although the very object of joining them may be to bind them by the decree, or even to obtain direct relief against them consequential upon the main relief prayed for.

> See Walden *vs.* Skinner, 101 U. S., 577, and Bacon *vs.* Rives, 106 U. S., 99, and the others cases cited on page 61 of our brief.

In any view, therefore, it must be established, in order to defeat the jurisdiction, that either the American Trust and Savings or the Northern Trust Company was at least a *necessary* party, and as such should be ranged on the same side of the controversy as the complainant, The Lake Street Company.

1. *The contentions of counsel as to the American Trust and Savings bank.*

The entire reasoning of counsel in support of their contention that the American Trust and Savings Bank is an indispensable party is based on the assumption that the controversy in the suit is as to the *appointment of a new trustee.*

The only allegations of alleged wrongful action in the bill are *against* the plaintiff in error, and the only relief prayed on account of such alleged wrongful action is against the plaintiff in error—an injunction restraining *it* from further prosecuting the suit to foreclose it had brought, and *its* removal as trustee.

And an examination of the bill will show that all its allegations relating to the alleged wrongful acts of plaintiff in error are directed solely to setting out the alleged grounds for the removal of *plaintiff in error* as trustee.

The appointment of a new trustee would only come after such removal, and therefore after the determination of the real controversy as set out in the bill, and in which alone the plaintiff in error was interested.

The further relief of the appointment of a new trustee was only consequential upon and following the decree as to the real matter in controversy, viz., as to the removal of plaintiff in error as trustee.

This is shown:

(1.) By the fact that the allegations of the bill are wholly limited to setting out the grounds for the removal of plaintiff in error as trustee. Under these allegations, the matter in controversy was as to the removal of plaintiff in error as trustee, and not as to the appointment of a new trustee, which could only be made after and as a consequence of a decree removing plaintiff in error as trustee.

As pointed out in our former brief, the trust deed which is made a part of the bill expressly provided that in case of the removal of one of the trustees the cotrustee should appoint the successor, as the decree which was entered directed should be done; and there was no allegation in the

bill that the American Trust and Savings Bank, the co-trustee, had refused or would refuse to appoint the successor in case the suit resulted in the removal of plaintiff in error.

In fact, it is expressly conceded by counsel for the American Trust and Savings Bank that the real matter in controversy, as shown by the bill, was as to the removal of plaintiff in error as trustee.

Counsel say:

"It is submitted and it appears on the face of the bill that the *dominant purpose* thereof is to remove the Farmers' Loan and Trust Company as trustee."

Brief on motion to dismiss, p. 15.

(2.) The sole controversy in which the plaintiff in error had any interest was that shown in the allegations of the bill which set out the grounds for its removal as trustee and the injunction prayed against it, and if its removal and the injunction asked were decreed, the decree would be a final determination of that controversy, and plaintiff in error would and could have no possible relation to or interest in the subsequent and consequential order for the appointment of a new trustee as its successor.

(3.) That the matter in controversy (which determines the question of jurisdiction) must necessarily be ascertained from the allegations of the bill and the theory of relief it presents, and not by the fact that complainant may have included in the prayer of the bill a prayer for further and consequential relief, which may affect parties, not necessarily parties to the main controversy presented by the allegations of the bill, is shown by the two cases of Walden *vs.* Skinner, 101 U. S., 577, and Bacon *vs.* Rives, 106 U. S., cited in our original brief (p. 62).

In the first of these cases (Walden *vs.* Skinner) it was held that the presence, as defendants, of executors having the same citizenship as the complainant, and against whom

the direct relief of a decree conveying the title was sought, and in fact decreed as a consequence of the main relief adjudged against the parties having the actual interest, did not affect the jurisdiction of the court over the main controversy, as shown by the bill, the parties to which had the requisite citizenship.

In the second of these cases (Bacon *vs.* Rives) the defendants, who had the same citizenship as the complainant, had in their possession the very funds sought to be reached and subjected to the payment of the decree asked against the parties actually interested in the main relief and in which the defendants, who were citizens of the same State as the complainant, had no actual interest.

(4.) That the prayer for the appointment of a new trustee was only for relief consequential upon and following the main relief, to which alone all the allegations of the bill were directed, is further conclusively shown by these facts:

The decree entered by the *State trial court* under the bill filed and affirmed by both the State Appellate and Supreme courts finds in detail the facts alleged in the bill as grounds for the removal of plaintiff in error as trustee, and that on the facts thus found the plaintiff in error should be removed as trustee, and thereupon decrees that plaintiff in error "be removed as trustee" (Pr. Rec., pp. 72–98), and that it be "perpetually enjoined from acting in any manner whatsoever" "as trustee" under the mortgage (Pr. Rec., pp. 98, 99).

It will be further observed that in all the detailed findings of the decree there is no finding of any fact as to the appointment of a new trustee, which, as we have seen, could only come after and as a consequence of the main decree—the decree for the removal of plaintiff in error.

Following this decree for the removal, etc., of plaintiff in error as trustee is the further consequential order (in which plaintiff in error had and could have no possible interest) that the American Trust and Savings Bank, cotrustee (act-

ing under the power in the trust deed), within thirty days from the entry of the decree "appoint a trustee" "in place of" the plaintiff in error, and that "upon such successor being so appointed" and its acceptance "such successor become vested with all the property rights, duties," etc., of plaintiff in error under the trust deed.

And it was only "upon the failure of" the American Trust and Savings Bank to make the appointment "within 30 days" that the court reserved to itself the power to appoint the cotrustee (Pr. Rec., p. 99).

It will be seen that in this consequential relief of the appointment of a new trustee, which could only follow after and as a consequence of the removal of plaintiff in error by the very decree entered, plaintiff in error had and could have no interest whatever.

That the question of the removability of a case, viz., whether it presents "a controversy between citizens of different States," must be determined from the allegations of the bill and not from the fact that the complainant asks particular relief against this or that party, for which there is no foundation in the bill itself.

> See our original brief, pp. 88, 89, and the authorities there cited.

In fact, as shown in our original brief, page 87, the appointment of a successor to plaintiff in error in the event of its removal could as well have been made the subject of an independent suit, if on account of the refusal or failure of the American Trust and Savings Bank or otherwise there should be occasion to apply to any court for the purpose, as the result showed there was not.

> See also on this point of the appointment of a new trustee, pp. 86–90 of our original brief.

The contention of counsel is also based wholly on the view that the American Trust and Savings Bank was a necessary party as *representative* of the bondholders.

We submit that the conclusive reasons we have given in answer to this view, on pages 80–86 of our brief, are wholly unanswered by counsel.

The contention that plaintiff in error and the American Trust and Savings Bank are *joint* tenants, and therefore the American Trust and Savings Bank is a necessary party, is fully answered on pages 79 and 80 of our brief and by the case of Stephen *vs.* Beall, 22 Wall., 329, there cited.

Counsel attempt to distinguish Stephen *vs.* Beall on the ground that the conveyance which created the joint tenancy in that case was not to *trustees* (Brief, p. 20), but manifestly, on the point in answer to which the case is cited—that the title of the American Trust and Savings Bank was that of a *joint tenant*, and therefore it was a necessary party—it is wholly immaterial that the title of the joint tenant was the entire title instead of the qualified title of trustee.

We also submit that our contention (Brief, pp. 91–100) that, even if the American Trust and Savings Bank is an indispensable or necessary party, it should not be ranged on the same side of the controversy as the plaintiff in error, is wholly unanswered.

2. *As to the Northern Trust Company.*

At pages 69–72 of our former brief we showed that the Northern Trust Company was not an indispensable or even a necessary party to the suit, and stated fully the reasons in support of this position.

The only ground on which counsel claim that the Northern Trust Company was an indispensable or necessary party under the bill, which contained no *allegations* in regard to it, is that *in the prayer for relief* it was made a defendant by the description of bondholder (Br., p. 15).

At pages 71, 72 of our former brief we showed that this position could not be sustained, and no answer is made by counsel to what we there said.

In answer to our position that, even if "it is assumed that the Northern Trust Company had such a relation to the controversy as made its citizenship material, it should not be ranged on the same side of the controversy with the Farmers' Loan and Trust Company," (see our former brief, pp. 72–78,) the contention of counsel for the American Bank is (Br., pp. 15, 16) this:

That, although the bill expressly alleged that *the Northern Trust Company* desired the removal of plaintiff in error (see our former brief, p. 73), nevertheless it must be ranged on the side of plaintiff in error, *because the bill did not allege that it desired that the new trustee should be appointed by the superior court, according to a prayer therefor contained in the bill;* that such prayer was "contrary to the terms of the trust deed" (Br., pp. 15, 16), and the inference sought to be drawn is (Br., p. 16) that *therefore* "there is nothing which makes it clear that the Northern Trust Company should be ranged with the complainant in the bill."

It would seem that the mere statement of this position is a sufficient answer to it.

As the bill in reality expressly alleged that *the Northern Trust Company* desired the removal of plaintiff in error, on what theory can it be claimed that that company should be ranged on the side of plaintiff in error on the main controversy as to removal, because the bill fails to say whether or not that company desired, after such removal was had, that the new trustee should be appointed by the Superior court or by the American bank?

Moreover, in addition to the specific prayer for an appointment of the new trustee by the court, the bill also contained a prayer for "other and further and different relief." It was under this prayer for general relief that the decree (Pr. Rec., pp. 99, 100) provided that the American bank should

appoint a new trustee, and on the appeal to the State supreme court the Northern Trust Company filed a brief in that court, in which it insisted on the affirmance of the decree on the merits (see our former brief, p. 78).

See also our further discussion of this point as to the American Bank, *supra*.

IV.

AS TO THE POINT MADE THAT "THE PETITION FOR REMOVAL WAS NOT IN COMPLIANCE WITH THE ACT, IN STATING THE AMOUNT INVOLVED AT THE TIME OF BRINGING THE SUIT."

This point is made by counsel for the Lake Street Company at pages 31, 32 of his brief.

The extremely technical character of this point is illustrated by the fact that the bill was filed on January 30 and the petition for removal on *the day following*, January 31, and by the further fact that, in the two very full briefs filed on the motion to dismiss, the point is not even suggested.

The contention is that the allegation of the petition for removal that "the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000," which follows the form in general use, is insufficient for the reason that it is not also alleged that "*at the time the suit was begun* there was $2,000 involved in the controversy, exclusive of costs."

Brief, pp. 31–38.

(1.) Manifestly, in any view, the question whether the allegation in the petition that "the matter in dispute *exceeds* $2,000" is sufficient depends upon whether the nature of the matter in dispute is such that the amount in controversy would or could be less at the time of the commencement of the suit than on the particular date of the petition.

If, under the facts and in view of the nature of the case, the allegation that in the petition the amount in controversy "exceeds" $2,000 was equivalent to and in effect the same as if it had expressly alleged that at the time of the commencement of the suit the amount in controversy exceeded that sum, there is no force in the contention.

The bill was filed on January 30, and the petition on the day following, January 31, and looking at the nature of the subject-matter of the controversy, as shown in the bill, viz., to remove plaintiff in error from its position as trustee and to enjoin it from prosecuting its bill to foreclose for the admitted defaults in interest to the amount of over $370,000, the allegation made in the petition was in effect the same as if it had specifically referred to the date of the commencement of the suit.

The question as to the allegation necessary in the petition as to the amount in dispute, which would naturally be the same at the time of the petition as at the time of the commencement of the suit, is not like that as to the citizenship of the parties, which, as pointed out in the cases of citizenship cited by counsel, may change by the change of residence of the one party or the other between the date of the commencement of the suit and that of the petition.

Hence, as all the forms in use show, it has never been deemed material to make the allegation (as in cases of citizenship) cover in specific terms the date of the commencement of the suit as well as that of the petition.

In La Montaigne *vs.* Harvey Lumber Co., 44 Fed. Rep., 645, cited by counsel, the claim that the amount in controversy exceeded $2,000 was admittedly based solely on matter brought into the case *subsequent to the commencement of the suit*, viz., by the filing of a counter-claim.

(2.) It is well settled that the question of the removability of a case is not to be determined from the allegations of the petition alone, but that the court in determining it may

look to the facts, as shown by the entire record, and that where the facts thus shown are sufficient to give jurisdiction the case is properly removed, although the petition itself may be defective in form.

Powers *vs.* Chesapeake R. R. Co., 169 U. S., 92, at p. 101, and cases cited.

In such case the form of the petition is not regarded as jurisdictional. If the necessary facts otherwise appear in the record, the defect may be cured by amendment in the United States court, which would not be the case if that court did not acquire jurisdiction.

Id.

In the case at bar, the amount in dispute *at the time of the filing of the petition to remove* is shown to be sufficient by the express allegation of the petition.

And, in addition to the express allegation of the petition, *the bill* shows on its face that the amount in dispute *at the time of the commencement of the suit* exceeded the amount necessary to obtain a removal.

In the first place, the bill sought the removal of plaintiff in error from its trusteeship; and even if the case had involved nothing except such removal, it involved the title, and for that reason the amount involved would be the value of the property, or at least the amount of the bonds secured by the trust deed.

Such was the express ruling in *Kenaday vs. Edwards*, 134 U. S., 117, in which on a bill filed by *cestuis que trustent* to remove their trustee, the trustee was removed, and on appeal to this court it was held that the value of the matter in dispute was sufficient to give this court jurisdiction.

This court said:

"*The order removing him as trustee involved his ownership and control of the trust estate for the objects expressed in the will, and therefore the value of that estate is the value of the matter in dispute for the purpose of an appeal by him.*"

But, *further*, the bill in this case on its face prayed for an injunction against the foreclosure of the trust deed to satisfy the two installments of unpaid interest, which amounted to over $300,000.

See *Dickinson vs. Trust Co.*, 64 Fed. Rep., 895.

V.

THE CONTENTIONS OF COUNSEL AS TO THE REMOVAL ON THE GROUND OF FEDERAL QUESTION.

This subject is discussed by counsel for the Lake Street Company at pages 29 and 30 of this brief, and by counsel for the American Bank at pages 25–27 of their brief.

(1.) It is contended, without much discussion, that the Federal question must appear on the face of the bill, and that in this case "the alleged pendency of a conflicting proceeding in the Federal courts" did not appear on the face of the bill (Br. for Lake St. Co., pp. 29, 30; Br. for American Bank, pp. 25, 26).

This contention was fully discussed by us at pages 108–118 of our former brief, and no attempt is made in either of the briefs for defendants in error to answer our reasoning in regard to it.

Counsel for the Lake Street Company does not discuss the question at all, but merely refers (Br., p. 29) to certain authorities, all of which merely apply the doctrine laid down in *Tennessee vs. Bank*, 152 U. S.—a doctrine which, as we fully pointed out at pages 108, 109 of our former brief, has no application to the case at bar.

(2.) It is contended that process was served in this case in the State court prior to the service of process in the foreclosure suit; that therefore the State court first acquired jurisdiction, and the conclusion attempted to be drawn from

this is *that there was no Federal question involved* (Br. for American Bank, pp. 26, 27; Br. for Lake St. Co., p. 29).

This contention is fully met by that we said under sub-point 3, at pages 115–117 of our former brief, and no attempt is made in either of the briefs for defendants in error to answer what we there said.

(3.) Counsel for the Lake Street Company says—but without arguing the point—that all the defendants should have joined in the petition for removal on the ground of Federal question. That this position cannot be supported was shown by us under sub-point 4, at pages 117, 118 of our former brief.

(4.) Under point IX, at pages 34, 35 of the brief for the Lake Street Company, counsel contends that—

"Even though a Federal question was raised by the answer and pleadings in the cause, yet as the decree of the court was right upon other and independent grounds, this court will not take jurisdiction, but dismiss the writ of error."

This is an attempt to apply to this case the doctrine that, where there is a Federal question in a case and also other and non-Federal questions, and the decision of the lower court can rest on such other questions, independent of the Federal question, this court will affirm the judgment.

This doctrine obviously has no application here, for if the State court erred either (1) in denying the removal to the United States court, or (2) in perpetually enjoining the prosecution of the foreclosure suit (see our former brief, pp. 135, 129), it is manifest that there is no ground on which the judgment can stand, and it must be reversed.

This is, in effect, conceded by counsel for the American bank in their statement as to what the questions are which it is necessary for this court to consider. (See their brief, p. 2.)

(5.) In the same connection, at page 35 of the brief for the Lake Street Company, counsel says that—

"The assignment of errors numbered 16, 17, 18, and 19 were not made in the Supreme Court of Illinois, and therefore cannot be considered by this court."

This statement is incorrect. The assignments of error numbered 16, 17, and 18 (Rec., pp. 620, 621) were all covered by our assignments of error on the appeal from the State appellate to the State supreme court. (See assignments of error in State supreme court, Nos. 21, 20, 5, 16, 1 to 5, inclusive, 29 to 32, inclusive, at pp. 596–597, 594, 595, 599, 600 of Pr. Rec.)

Assignment No. 19 (Pr. Rec., pp. 621, 622) is covered by the assignments of error last referred to in the State supreme court, and also by assignments Nos. 6 to 13, inclusive, and No. 17 in the State supreme court. (See Pr. Rec., pp. 594, 595.)

VI.

COUNSEL'S CONTENTIONS AS TO OUR POSITION THAT THE DECREE WAS ERRONEOUS IN PERPETUALLY ENJOINING THE FURTHER PROSECUTION OF THE FORECLOSURE SUIT.

We stated and discussed our position on this point at pages 135–139 of our former brief, and that discussion fully meets what counsel have to say on the question (see Br. for American Bank, p. 27; Br. for Lake St. Co., p. 34), and further discussion of the point on our part is unnecessary.

Counsel for the Lake Street Company cites in this connection *Moran vs. Sturgis*, 104 U. S., 256, and *Rogers vs. Pitt*, 96 Fed. Rep., 669.

In those cases it was held, under the particular facts, that the United States court had acquired prior jurisdiction of the cases, and the rule was laid down that, having done so,

the United States court was entitled to retain such jurisdiction without interference on the part of the State court. In neither of the cases was any point decided which was in conflict with the three reasons which we stated at page 138 of our former brief why it should be held that the United States circuit court acquired jurisdiction of the foreclosure suit before the State court acquired jurisdiction of the case at bar.

The reasons we there stated for so holding are nowhere discussed in either of the briefs filed for defendants in error.

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